

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

GRAHAM-BINGHAM IRREVOCABLE  
TRUST, a Washington trust; and HENRY  
DEAN, Trustee of the Graham-Bingham  
Irrevocable Trust,

Plaintiffs,

v.

JOHN HANCOCK LIFE INSURANCE  
COMPANY USA,

Defendant.

No. C10-1185Z

ORDER

THIS MATTER comes before the Court on a motion for summary judgment brought by defendant John Hancock Insurance Company USA (“John Hancock”), docket no. 37, and a cross-motion for partial summary judgment brought by plaintiffs Graham-Bingham Irrevocable Trust (the “Trust”) and trustee Henry Dean, docket no. 43. Having reviewed all papers filed in support of, and in opposition to, the parties’ motions, and having considered the oral arguments of counsel, the Court

1 entered a Minute Order, docket no. 78, granting in part and denying in part each  
2 motion. This Order explains the Court's reasons for its rulings on the parties' motions.

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4 The central issue in this case is whether a variable life insurance policy issued  
5 by John Hancock in July 2006 (the "Policy") remains in effect despite failure by the  
6 owner of the Policy, namely the Trust, to timely pay a premium. A premium in the  
7 amount of roughly \$544,000 was due on February 20, 2010. The Trust arranged for a  
8 third party, Donald Trudeau, to pay the premium. The check that Mr. Trudeau  
9 presented, however, was dishonored because of non-sufficient funds ("NSF"), and  
10 John Hancock declared the Policy lapsed. Plaintiffs then brought this action, asserting  
11 several claims aimed at either securing a refund of the premiums previously paid or  
12 reviving the Policy, which had a face value of \$23 million.

14 Plaintiffs allege that John Hancock violated certain provisions of Washington's  
15 Insurance Law, RCW Title 48, and that these violations are actionable under that  
16 statute. Plaintiffs also contend that these violations constitute a breach of contract, a  
17 violation of Washington's Consumer Protection Act ("CPA"), and a breach of the duty  
18 of good faith owed by an insurer. Plaintiffs further assert that John Hancock violated  
19 the Washington State Securities Act ("WSSA") and engaged in fraud. As explained in  
20 this Order, many of plaintiffs' claims are not cognizable or lack merit as a matter of  
21 law. As to plaintiffs' CPA and bad faith claims, however, the Court concludes that  
22 plaintiffs have presented triable issues.

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1 **Background**

2 **A. Chronology of Events**

3 The Policy in question was issued on July 10, 2006. It insures the life of  
4 Frances P. Graham, who is now 88 years old. Carli Decl. at ¶¶ 8-9 & Exs. 2 & 3  
5 (docket nos. 39, 39-2, & 39-3). On December 21, 2009, John Hancock sent the Trust a  
6 Lapse Warning Notice, advising that the Policy would lapse if a premium in the  
7 amount of \$544,147.24 was not received by February 20, 2010. *Id.* at ¶ 14; Ex. 13 to  
8 Merkl Decl. (docket no. 38-12). On January 21, 2010, John Hancock sent a Lapse  
9 Warning Reminder Notice containing the same information. Carli Decl. at ¶ 15  
10 (docket no. 39); Ex. 14 to Merkl Decl. (docket no. 38-12).

13 In May 2009, the Trust had commenced efforts to sell the Policy. Response to  
14 Interrogatory No. 14, Ex. 12 to Merkl Decl. (docket no. 38-11). Donald Trudeau  
15 expressed interest in the Policy. Dean Dep. at 79:3-10, Ex. 1 to Merkl Decl. (docket  
16 no. 38-1). Given this interest, the Trust arranged to have Mr. Trudeau pay the  
17 premium due in February 2010. *See* Ex. 26 to Merkl Decl. (docket no. 38-14);  
18 Trudeau Dep. at 76:22-25, 155:11-14, Ex. 7 to Merkl Decl. (docket no. 38-8);  
19 Johnston Decl. Ex. 55-D (docket no. 49-3).

21 On February 20, 2010, Mr. Trudeau deposited a check for \$554,000 at a  
22 Citibank branch in Connecticut, to be credited to a John Hancock account typically  
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1 used for wire transfers.<sup>1</sup> Ex. 1-D to Johnston Decl. (docket no. 50); Trudeau Dep. at  
2 70:11-71:3, Ex. 7 to Merkl Decl. (docket no. 38-8); King Dep. at 101:7-102:5, Ex. 9 to  
3 Merkl Decl. (docket no. 38-10). The check contained the words “Frances Graham  
4 Policy” and the Policy number. Ex. 1-D to Johnston Decl. (docket no. 50). On  
5 February 22, 2010, Mr. Trudeau gave a copy of the deposit receipt to the Trust’s  
6 broker, who transmitted it to John Hancock. Samuelson Decl. at ¶¶ 3-5 & Exs. 1 & 2  
7 (docket no. 40); Kosmos Dep. at 39:3-4, 156:10-12, Ex. 4 to Merkl Decl. (docket  
8 no. 38-5); Klein Dep. at 111:13-25, 113:4-9, Ex. 28 to Merkl Decl. (docket no. 38-14).  
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11 On February 20, 2010, John Hancock’s computer system automatically  
12 generated and sent to the Trust a Lapse Termination Notice, advising that the “Policy  
13 terminated due to insufficient funds available to cover policy charges.” Carli Decl. at  
14 ¶ 16 (docket no. 39); Ex. 16 to Merkl Decl. (docket no. 38-12). When John Hancock’s  
15 Reinstatement Team subsequently received the copy of the deposit receipt provided by  
16 Mr. Trudeau and submitted by the Trust’s broker, it agreed to treat the February 20,  
17 2010, lapse as a lapse in error (“LIE”) and to administer the Policy as though it had  
18 never lapsed. Frazee Decl. at ¶¶ 3-5 & Ex. 1 (docket no. 42); Exs. 9 & 17 to Carli  
19 Decl. (docket nos. 39-9 & 39-11); Carli Dep. at 98:8-23, Ex. 8 to Merkl Decl. (docket  
20 no. 38-9); Dean Tr. 121:1-10, 122:13-15, Ex. 1 to Merkl Decl. (docket no. 38-1).  
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24 <sup>1</sup> The account upon which Mr. Trudeau drew the check contained less than \$150 at the time the check  
25 was presented to Citibank. Ex. 18 to Merkl Decl. (docket no. 38-12). Mr. Trudeau knew that the  
26 account did not have sufficient funds to cover the check, but he did not notify the Trust of this fact  
either at the time he presented the check or when his bank advised him three days later that the check  
had been dishonored. Trudeau Dep. at 196:25-197:4, 221:15-222:6, Ex. 7 to Merkl Decl. (docket  
no. 38-8); Ex. 17 to Merkl Decl. (docket no. 38-12).

1 On March 4, 2010, John Hancock sent the Trust a Confirmation of Transaction,  
2 and the next day, it sent the Trust a letter. Both the Confirmation and the letter  
3 indicated that \$554,000 had been paid on February 20, 2010. Ex. 6 to Carli Decl.  
4 (docket no. 39-8); Ex. X to Johnston Decl. (docket no. 51 at 2). On April 16, 2011, the  
5 Trust submitted another premium payment in the amount of \$60,000. Ex. X to  
6 Johnston Decl. (docket no. 51 at 29 & 30). On April 21, 2010, John Hancock  
7 generated a related Confirmation of Transaction. Carli Decl. at ¶ 19 & Ex. 7 (docket  
8 nos. 39 & 39-8). Also on April 21, 2010, John Hancock sent the Trust a Quarterly  
9 Activity Statement, indicating that the Policy's cash surrender value was \$94,781.43  
10 and that a payment of \$554,000 had been made. Carli Decl. at ¶ 20 & Ex. 8 (docket  
11 nos. 39 & 39-8).  
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14 According to plaintiffs, sometime prior to these communications from John  
15 Hancock, the Trust was negotiating, through its broker, to sell the Policy to a third  
16 party. Plaintiffs allege that a potential buyer requested a Verification of Coverage  
17 ("VOC"). Dean Decl. at ¶ 2 (docket no. 44-2). On April 22, 2010, in response to the  
18 Trust's broker's request, John Hancock furnished the Trust with a VOC, which  
19 represented that the Policy was in effect. *Id.*; King Decl. at ¶ 7 & Ex. 1 (docket  
20 no. 41). The VOC additionally stated that no premium payment was due until July 21,  
21 2010. Ex. 1 to King Decl. (docket no. 41). Plaintiffs claim that, after the VOC was  
22 issued, a third party made a written offer to purchase the Policy for \$3.1 million, but  
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1 because John Hancock declared the Policy lapsed, “the deal fell apart.” Dean Decl. at  
2 ¶ 3 (docket no. 44-2); see Ex. D-70 to Johnston Decl. (docket no. 58-1).

3  
4 John Hancock declared the Policy lapsed on April 26, 2010. The events leading  
5 up to this decision are as follows. On or about March 5, 2010, John Hancock’s  
6 Treasury Department received notice that Mr. Trudeau’s check had been dishonored as  
7 NSF. Carli Decl. at ¶ 26 & Ex. 10 (docket nos. 39 & 39-9 at 14). The Treasury  
8 Department did not receive the dishonored check until March 24, and the Billing &  
9 Income Team did not link the dishonored check to the Policy until April 22, 2010.  
10 Carli Decl. at ¶¶ 21, 23-27 & Exs. 11 & 12 (docket nos. 39, 39-9, & 39-10); Carli Dep.  
11 at 134:5-12, Ex. 8 to Merkl Decl. (docket no. 38-9). On April 26, 2010, John Hancock  
12 sent a letter (dated April 22, 2010) to former trustee David Bingham, indicating that  
13 the check “protested due to Non-Sufficient Funds” and that the premium payment had  
14 been reversed. Carli Decl. at ¶ 28 & Ex. 13 (docket nos. 39 & 39-10). The letter  
15 further stated that “[f]ailure to provide a replacement check by the premium due date  
16 may result in policy lapse and termination of your contract,” but it did not specify a  
17 premium due date. Ex. 13 to Carli Decl. (docket no. 39-10). On July 27, 2010, John  
18 Hancock sent a letter indicating that the Policy “ha[d] lapsed effective February 20,  
19 2010,” and enclosing a refund of the \$60,000 premium paid in April 2010. Ex. 22 to  
20 Merkl Decl. (docket no. 38-13). The Trust declined to accept the refund. Carli Decl.  
21 at ¶ 20 (docket no. 39).

1 **B. Form of Lapse Notices**

2 In July 2009, three years after the Policy was issued, but before John Hancock  
3 sent the lapse notices in question, a new Washington statute relating to such notices  
4 went into effect. The new legislation requires an insurer to send, along with any lapse  
5 notice relating to a policy insuring the life of an individual 60 years of age or older, a  
6 notice of alternative transactions. RCW 48.102.100(1)(c). On July 28, 2009, an  
7 emergency regulation went into effect specifying the language to be used in notices of  
8 alternative transactions. WAC 284-97-910 (2009), Ex. 19 to Carli Decl. (docket no.  
9 39-12 at 21). Although John Hancock knew about the regulation, it did not send a  
10 notice of alternative transactions to the Trust when it mailed the Lapse Warning Notice  
11 in December 2009 or when it mailed the Lapse Warning Reminder Notice in January  
12 2010. Carli Dep. 110:7-24, Ex. 8 to Merkl Decl. (docket no. 38-9); Hough Decl. at  
13 ¶ 15 (docket no. 55).

14 The parties dispute whether John Hancock's failure to send a notice of  
15 alternative transactions was justified or a willful violation of the statute. John  
16 Hancock contends that the text of the emergency regulations was confusing. Hough  
17 Decl. at ¶¶ 7, 14-15 (docket no. 55). It asserts that, because it knew the regulation  
18 would soon be revised, it reasonably decided to wait for the issuance of the amended  
19 text before sending out any notices of alternative transactions. *Id.*; *see also* Ex. 7 to  
20 Hough Decl. (docket no. 55 at 49). Plaintiffs counter that, in making this decision,  
21 John Hancock understood that it was "accepting the risk in not being fully compliant"  
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1 and knew that it “could be dinged for non-compliance.” Ex. 4 to Hough Decl. (docket  
2 no. 55). A revised regulation, which is virtually identical to the emergency regulation,  
3 was issued on March 2, 2010, and John Hancock began using the approved text in  
4 lapse notices in April 2010. Hough Decl. at ¶ 17 (docket no. 55); compare WAC 284-  
5 97-910 (2010) with WAC 284-97-910 (2009).  
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## 7 **Discussion**

### 8 **A. Summary Judgment Standard**

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10 The Court shall grant summary judgment if no genuine issue of material fact  
11 exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P.  
12 56(a) (2010). In support of a motion for summary judgment, the moving party need  
13 not negate the opponent’s claim, Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986);  
14 rather, the moving party will be entitled to judgment if the evidence is not sufficient  
15 for a jury to return a verdict in favor of the opponent, Anderson v. Liberty Lobby, Inc.,  
16 477 U.S. 242, 249 (1986). When the record taken as a whole, could not lead a rational  
17 trier of fact to find for the non-moving party, summary judgment is warranted. See  
18 Beard v. Banks, 548 U.S. 521, 529 (2006).  
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### 20 **B. Violation of Insurance Law**

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22 Plaintiffs assert that John Hancock violated RCW 48.23.030, 48.18.290(1)(c),  
23 and 48.102.100(1)(c) and is therefore liable for “Breach of Insurance Law.” Second  
24 Am. Compl. ¶ 30 (docket no. 12). RCW Title 48, however, does not create a private  
25 cause of action. Pain Diagnostics & Rehab. Assocs., P.S. v. Brockman, 97 Wn. App.  
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691, 697, 988 P.2d 972 (1999) (“In creating the insurance regulatory scheme, the Legislature and the insurance commissioner did not intend to provide protection or remedies for individual interests; they only intended to create a mechanism for regulating the insurance industry. Instead, private causes of action for violations of the insurance statutes and regulations must be brought under the CPA.”); see Jepson v. Ticor Title Ins. Co., 2007 WL 2060856 at \*2 (W.D. Wash. May 1, 2007) (“[p]laintiff’s attempt to manufacture an implied private right of action under § 48.29.140 has no merit in light of [*Pain Diagnostics*]”).

Moreover, two of the three statutes on which plaintiffs rely, RCW 48.23.030 and RCW 48.18.290(1)(c), do not apply to the Policy. RCW 48.23.030 does not apply to variable life insurance policies. See RCW 48.18A.050. RCW 48.18.290 does not apply to “contracts of life or disability insurance without provision for cancellation prior to the date to which premiums have been paid.” RCW 48.18.290(5). Plaintiffs identify no provision in the Policy for cancellation that would render RCW 48.18.290 applicable. See Ex. 3 to Carli Decl. (docket no. 39-3) (Section 11 of the Policy allows termination for only non-payment of a premium, surrender of the Policy by the insured, or death of the insured). Thus, plaintiffs have no cognizable stand-alone claim for violation of RCW 48.23.030, RCW 48.18.290, or Washington’s Insurance Law generally.

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1 **C. Breach of Contract**

2 In alleging that John Hancock breached the Policy, plaintiffs assert two  
3 different theories. First, they contend that John Hancock accepted Mr. Trudeau's  
4 check as payment of the premium due in February 2010, and that John Hancock's  
5 declaration of lapse therefore constitutes a breach of contract. Second, plaintiffs argue  
6 that the new statute requiring notice of alternative transactions became a term of the  
7 Policy and that John Hancock breached the Policy by failing to provide such notice.  
8 Plaintiffs' analysis is flawed.  
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11 **1. Check Was Not "Accepted"**

12 Plaintiffs assert that John Hancock manifested an intent to accept the NSF  
13 check as unconditional payment of the premium at issue. Plaintiffs misunderstand the  
14 relevant legal doctrines. Under Washington law, payment by check or other  
15 instrument is conditional unless the parties agree otherwise. *Barlean v. Rogers*, 596  
16 P.2d 1327, 1328 (Or. Ct. App. 1979) (applying Washington law). In other words, the  
17 giving of a check or other instrument for a pre-existing debt does not discharge the  
18 preexisting debt and create a new debt independent thereof in the absence of an  
19 agreement between the parties to that effect. *Blenz v. Fogle*, 127 Wn. 224, 232, 220 P.  
20 790 (1923); *see also Pardee v. Jolly*, 163 Wn.2d 558, 570, 182 P.3d 967 (2008) ("The  
21 issuance of an uncertified check suspends the underlying obligation until the check is  
22 paid or certified. If a check is dishonored and the person entitled to enforce the check  
23 is the obligee of the obligation for which the check was taken, the obligee may enforce  
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1 either the instrument or the obligation.”); *Rains v. Lewis*, 20 Wn. App. 117, 123, 579  
2 P.2d 980 (1978); see also RCW 62A.3-310. The party asserting an agreement to  
3 discharge the preexisting obligation bears the burden of proving its existence. *Blenz*,  
4 127 Wn. at 232.

6 In this case, plaintiffs present no evidence of such agreement. Instead, they  
7 suggest that an agreement may be inferred from “the circumstances and the conduct of  
8 the parties,” citing *New York Life Ins. Co. v. Miller*, 135 F.2d 550, 551 (9th Cir. 1943).  
9 Neither the circumstances nor the conduct of the parties warrant such inference.  
10 Mr. Trudeau did not present the check directly to John Hancock. The check was  
11 presented to Citibank, which routed it to the bank on which it was drawn, namely  
12 Wachovia, at which point the check was not “accepted” within the meaning of  
13 RCW 62A.3-409(a), but rather was dishonored. Ex. 1-D to Johnston Decl. (docket  
14 no. 50); Ex. 17 to Merkl Decl. (docket no. 38-12). Before learning of this dishonor,  
15 John Hancock decided to treat the Policy as if it were in effect after February 20, 2010.  
16 This conduct was not based on the check itself, but rather on the deposit receipt  
17 submitted by the Trust’s broker. Samuelson Decl. at ¶ 3 (docket no. 40). Thus,  
18 plaintiffs have provided no basis for imputing to John Hancock either an intent or an  
19 agreement to treat Mr. Trudeau’s check as discharging the underlying obligation to  
20 pay the premium due in February 2010.  
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2. **Policy Lapsed Despite Failure to Give Notice of Alternative Transactions**

Plaintiffs attempt to avoid the clear rule that non-payment of a life insurance premium results in the forfeiture of the policy, *Klein v. N.Y. Life Ins. Co.*, 104 U.S. 88, 90 (1881), by asserting that John Hancock's violation of RCW 48.102.100(1)(c) vitiated any lapse of the Policy. Although the Court agrees that, as a matter of law, John Hancock violated RCW 48.102.100(1)(c) by not sending the requisite notices in December 2009 and January 2010,<sup>2</sup> the Court rejects plaintiffs' argument that such violations prevented the Policy from lapsing. Nothing in RCW Chapter 48.102 makes compliance with statutory notice requirements a condition precedent to the lapsing of a life insurance policy.

In this respect, RCW 48.102.100 is very different from RCW 48.18.290, which prohibits the cancellation of an insurance policy absent the advance notice mandated by the statute. *See Olivine Corp. v. United Capitol Ins. Co.*, 147 Wn.2d 148, 162, 52 P.3d 494 (2002) (interpreting RCW 48.18.290 (1998) ("Cancellation by the insurer . . . may be effected as to any interest only upon compliance with the following:

(a) Written notice of such cancellation . . . ." (emphasis in original))). The dissimilar language of the statutes is consistent with the distinction between cancellation of a

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<sup>2</sup> John Hancock cannot avoid the conclusion that it violated RCW 48.102.100(1)(c) by contending that it was justified in waiting to issue alternative transaction notices until after the regulation outlining the text of such notices was amended. The statute was in effect when John Hancock sent the Trust the lapse notices at issue, and the form set forth in the regulation did not in fact change much between July 2009 and March 2010. In other words, John Hancock's reason for delaying its compliance with the statute does not go to whether it violated the statute, but rather to whether such violation gives rise to a CPA and/or bad faith claim, which constitutes a factual issue for trial.

1 policy, a unilateral act by the insurer, *see Safeco Ins. Co. v. Irish*, 37 Wn. App. 554,  
2 558, 681 P.2d 1294 (1984), and lapse of a policy, an automatic result of an insured's  
3 failure to timely pay a premium.  
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5 **3. Statutory Notice Is Not Term of Policy**

6 Plaintiffs' further use of RCW 48.102.100(1)(c) as a basis for claiming breach  
7 of contract is equally unavailing. Although regulatory statutes are generally  
8 incorporated by law into insurance policies, they cannot be treated as terms of a policy  
9 when they are enacted after the policy is issued and they are not expressly retroactive.  
10 *See Vadheim v. Cont'l Ins. Co.*, 107 Wn.2d 836, 840, 734 P.2d 17 (1987); *Britton v.*  
11 *Safeco Ins. Co. of Am.*, 104 Wn.2d 518, 528, 707 P.2d 125 (1985); *Tremper v. Nw.*  
12 *Mut. Life Ins. Co.*, 11 Wn.2d 461, 464, 119 P.2d 707 (1941); *In re Heilbron's Estate*,  
13 14 Wn. 536, 543, 45 P. 153 (1896); *see also* U.S. Const. art. I, § 10; Wash. Const.  
14 art. I, § 23 ("[n]o . . . law impairing the obligations of contracts shall ever be passed").  
15 RCW 48.102.100(1)(c) became effective on July 26, 2009, over three years after the  
16 Policy was issued, and the language of the statute contains no indication that the  
17 Legislature intended it to be applied retroactively. The Court HOLDS, as a matter of  
18 law, that RCW 48.102.100 is not a term of the Policy.  
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1 **D. Violation of WSSA and Fraud**

2 With regard to plaintiffs' securities claim, John Hancock moved for summary  
3 judgment on three grounds: (i) failure to adequately plead the WSSA claim;  
4 (ii) failure to bring the claim within the 3-year limitations period; and (iii) failure to  
5 present a viable claim. As to plaintiffs' fraud claim, John Hancock made similar  
6 arguments regarding plaintiffs' deficient pleading and failure to establish a prima facie  
7 case. The Court is persuaded that plaintiffs' WSSA and fraud claims are both lacking  
8 in merit and that neither claim is sufficiently pleaded. As a result, the Court need not  
9 and does not address whether the statute of limitations bars plaintiffs' WSSA claim.  
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12 The WSSA imposes civil liability on any person who offers or sells a security  
13 in violation of certain statutory provisions. See RCW 21.20.430(1). The only  
14 provision that plaintiffs allege John Hancock violated is RCW 21.20.010(2), which  
15 prohibits a person from making "any untrue statement of a material fact" or from  
16 omitting "a material fact necessary in order to make the statements made, in the light  
17 of the circumstances under which they are made, not misleading." Plaintiffs' WSSA  
18 claim is not premised on any misrepresentation, but rather on John Hancock's failure  
19 to reveal certain information before the Trust purchased the Policy. Plaintiffs' fraud  
20 claim is likewise based on an alleged breach of an affirmative duty to disclose a  
21 material fact. See Crisman v. Crisman, 85 Wn. App. 15, 21, 931 P.2d 163 (1997).  
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1 The information plaintiffs contend should have been included in the Prospectus  
 2 is as follows:

- 3 • death benefits on variable life insurance policies are seldom paid;
- 4 • part of the value of a life insurance policy is the ability to sell it on a
- 5 secondary market;
- 6 • the secondary market for life insurance policies is thriving;
- 7 • variable life insurance policies are hard to sell because they are securities;
- 8 • jumbo life insurance policies are hard to sell; and
- 9 • as a jumbo, variable life insurance policy, the policy at issue would be  
 extremely difficult to sell.

10 See Plaintiffs' Motion at 23:15-22 (docket no. 43).

11 Because the primary purpose of the WSSA is to protect investors, it is  
 12 construed liberally. Guarino v. Interactive Objects, Inc., 122 Wn. App. 95, 109, 86  
 13 P.3d 1175 (2004). To establish a claim under the WSSA, an investor must prove  
 14 (i) the seller made material misrepresentations or omissions about the security and  
 15 (ii) the investor relied on those misrepresentations or omissions. Stewart v. Estate of  
 16 Steiner, 122 Wn. App. 258, 264, 93 P.3d 919 (2004). In an omission case, like the one  
 17 before the Court, a rebuttable presumption of reliance exists. Guarino, 122 Wn. App.  
 18 at 119. A defendant may rebut the presumption of reliance by showing that “the  
 19 plaintiff’s decision would have been unaffected even if the omitted fact had been  
 20 disclosed.” Id.

21 The presumption of reliance does not, however, arise unless the plaintiff proves  
 22 that the omission at issue is material. Id. For an undisclosed fact to be material, the  
 23 plaintiff must establish a substantial likelihood that disclosure “of the omitted fact  
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1 would have been viewed by the reasonable investor as having significantly altered the  
2 ‘total mix’ of information made available.” *Id.* at 114. When contingent or  
3 speculative events are involved, materiality depends upon on a balancing of the  
4 indicated probability of the event occurring and the anticipated magnitude of the event.  
5 *Id.*

7 Statements about future performance are not representations of existing fact and  
8 generally will not support a claim of fraud or misrepresentation. *Seattle Pac. Indus.,*  
9 *Inc. v. Melmarc Prods., Inc.*, 2007 WL 397450 at \*3 (W.D. Wash. Jan. 31, 2007).

10 A representation that something will be done in the future cannot be either true or false  
11 at the time it is made. *Id.* Moreover, failure to make forecasts about future events is  
12 not actionable. *In re Verifone Secs. Litig.*, 11 F.3d 865, 869 (9th Cir. 1993);  
13 *Scognamillo v. Credit Suisse First Boston, LLC*, 587 F. Supp. 2d 1149, 1160 (N.D.  
14 Cal. 2008). Likewise, a claim for fraudulent misrepresentation or omission cannot be  
15 based on matters of opinion. *See Lincoln v. Keene*, 51 Wn.2d 171, 174-75, 316 P.2d  
16 899 (1957); *O’Neil v. Washelli Cemetery Ass’n*, 138 Wn. 566, 568-69, 244 P. 990  
17 (1926); *Westby v. Gorsuch*, 112 Wn. App. 558, 570-71, 50 P.3d 284 (2002); *Holly*  
18 *Homes, Inc. v. Urban Housing Group Ltd. P’ship V*, 1997 WL 3199 at \*3 (Wash. Ct.  
19 App. June 27, 1997).

20 The Court HOLDS, as a matter of law, that the information plaintiffs allege was  
21 unlawfully omitted from the Prospectus falls within the realm of forecasts and  
22 opinions and does not involve any material facts. In essence, plaintiffs seek to hold  
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1 John Hancock liable for not providing a written prediction that the Policy would be  
2 difficult to sell. Ease or difficulty is a matter of opinion, with some viewing as easy  
3 what others perceive as difficult, and any statement about whether market conditions  
4 at some unknown future date might favor or deter a sale would be nothing more than  
5 speculation. Thus, plaintiffs cannot establish a prima facie case for either their WSSA  
6 or their fraud claim.  
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8 The Court further CONCLUDES that plaintiffs have failed, as a matter of law,  
9 to link the alleged omissions to any statement actually made by John Hancock  
10 concerning the marketability of either the policy at issue or any similar or different  
11 types of policies. Plaintiffs point to nothing actually in the Prospectus that is  
12 misleading as a result of the absence of the information plaintiffs believe should have  
13 been included. This lack of proof constitutes an independent basis for dismissing  
14 plaintiffs' WSSA claim. See RCW 21.20.010(2) (imposing liability for omitting only  
15 "a material fact necessary in order to make the statements made, in the light of the  
16 circumstances under which they are made, not misleading").  
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18 Not only are plaintiffs' WSSA and fraud claims lacking in merit, they were not  
19 sufficiently pleaded. In the original complaint, the Trust included the following  
20 allegation:  
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23 In connection with the issuance of the Policy, Defendant made materially  
24 misleading statements of fact, and/or failed to make disclosures  
25 regarding the Policy necessary to make those statements of fact made by  
26 Defendant, not materially misleading.

1 Complaint at ¶ 7 (docket no. 1). The original complaint made no reference to the  
2 Prospectus dated May 1, 2006, and it did not identify with specificity any material  
3 facts that John Hancock either misrepresented or omitted.  
4

5 In October 2010, the Trust filed a Second Amended Complaint.<sup>3</sup> This now  
6 operative pleading did not improve matters. As acknowledged by plaintiffs' counsel  
7 during oral argument, Paragraph 7 of the original complaint was deleted, and the  
8 operative pleading contains no allegation (even in a formulaic or conclusory form) of a  
9 misleading statement or omission. The Ninth Circuit has repeatedly held that an  
10 "amended complaint supersedes the original," which is treated thereafter as "non-  
11 existent." *E.g., Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997). The  
12 Court CONCLUDES that, with respect to the WSSA and fraud claims, the Second  
13 Amended Complaint does not meet the pleading standards articulated in *Bell Atlantic*  
14 *Corp. v. Twombly*, 550 U.S. 544 (2007), and its progeny. As explained in *Twombly*, a  
15 complaint must offer "more than labels and conclusions" and must contain more than a  
16 "formulaic recitation of the elements of a cause of action." *Id.* at 555.  
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19 The Ninth Circuit has made clear that "summary judgment is not a procedural  
20 second chance to flesh out inadequate pleadings." *Wasco Prods., Inc. v. Southwall*  
21 *Techns., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006) (citing *Fleming v. Lind-Waldock &*  
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24 <sup>3</sup> The Second Amended Complaint alleged violation of federal securities law, but plaintiffs' summary  
25 judgment briefing discussed only state securities law. Thus, whether plaintiffs are asserting a federal  
26 claim remains unclear. Any federal claim, however, would be analyzed in the same manner as  
plaintiffs' WSSA claim and would similarly fail. *See Shawmut Bank, N.A. v. Kress Assocs.*,  
33 F.3d 1477, 1484 (9th Cir. 1994) (claim under § 10(b) of the Securities and Exchange Act likewise  
requires a misstatement or an omission of material fact).

1 Co., 922 F.2d 20, 24 (1st Cir. 1990)). To the extent plaintiffs contend that they could  
 2 amend or supplement their complaint by presenting factual allegations in their  
 3 summary judgment briefing, the weight of authority contradicts them. See, e.g.,  
 4 Shanahan v. City of Chicago, 82 F.3d 776, 781 (7th Cir. 1996). In addition, to the  
 5 extent plaintiffs now seek to amend their complaint, the Court denies such request as  
 6 futile. See Gordon v. City of Oakland, 627 F.3d 1092, 1094 (9th Cir. 2010) (“leave  
 7 may be denied if amendment of the complaint would be futile”). Given the failure to  
 8 identify actionable omissions of material fact and the missing link between the alleged  
 9 omissions and any actual representations, the Court granted John Hancock’s motion  
 10 for summary judgment as to plaintiffs’ WSSA and fraud claims.  
 11

#### 13 **E. CPA and Bad Faith Claims**

14 With respect to plaintiffs’ CPA<sup>4</sup> and bad faith<sup>5</sup> claims, John Hancock contends  
 15 that summary judgment is warranted because plaintiffs cannot establish either  
 16 causation or damages. The Court is satisfied that plaintiffs have presented sufficient  
 17 evidence to raise triable issues as to these elements of their CPA and bad faith claims.  
 18 Plaintiffs’ CPA claim is premised solely on John Hancock’s failure to provide notices  
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20 <sup>4</sup> To establish a violation of the CPA, a private plaintiff must prove (i) the defendant engaged in an  
 21 unfair or deceptive act or practice; (ii) such act or practice occurred within a trade or business;  
 22 (iii) such act or practice affected the public interest; (iv) the plaintiff suffered an injury to business or  
 23 property; and (v) a causal relationship exists between the defendant’s act or practice and the plaintiff’s  
 injury. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 785-93, 719  
 P.2d 531 (1986).

24 <sup>5</sup> Bad faith claims sound in tort. Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc., 161 Wn.2d  
 25 903, 915, 169 P.3d 1 (2007). They are analyzed under the same principles as any other tort, requiring  
 26 a plaintiff to show existence of a duty, breach of that duty, and damages proximately caused by such  
 breach. Id. at 916. To establish bad faith, a plaintiff must prove that the breach was “unreasonable,  
 frivolous, or unfounded.” Id.

1 of alternative transactions in violation of RCW 48.102.100(1)(c). John Hancock  
2 argues that plaintiffs cannot link the lack of notice to any injury, reasoning that  
3 plaintiffs already knew they could, and had actually taken steps to, sell the Policy. The  
4 required notice of alternative transactions, however, would have advised plaintiffs of  
5 more than just the possibility of “a life settlement,” *i.e.*, a sale to a third party, *see*  
6 WAC 284-97-910 (listing eight alternatives to lapse), and the Court cannot conclude  
7 as a matter of law that such notice would not have made a difference in how plaintiffs  
8 proceeded prior to the lapse of the Policy. *See Indoor Billboard/Wash., Inc. v. Integra*  
9 *Telecom of Wash., Inc.*, 162 Wn.2d 59, 83, 170 P.3d 10 (2007) (“Proximate cause is a  
10 factual question to be decided by the trier of fact.”).

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13 The Court notes, however, that plaintiffs’ damages for their CPA claim appear  
14 to be limited to the value of the options actually available to them at the time the  
15 notice of alternative transactions was not provided, *i.e.*, in December 2009 or January  
16 2010, or at the latest on February 20, 2010, when the premium was due. The only  
17 such damages appear to be the cash surrender value of the Policy. *See* WAC 284-97-  
18 910. The other alternatives of which plaintiffs were entitled to notice are either  
19 inapplicable or would have required third-party involvement, which the Court would  
20 tend to view as a matter of speculation.<sup>6</sup> The parties are encouraged to further address  
21 this issue in their trial briefs.  
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24  
25 <sup>6</sup> Although rescission might be an available remedy for a CPA claim predicated on an unfair or  
26 deceptive trade practice that induced the purchase, *see Allen v. Am. Land Research*, 95 Wn.2d 841,  
852, 631 P.2d 930 (1981), plaintiffs make no such claim. Given the nature of their CPA claim,  
plaintiffs would likewise not be entitled to injunctive relief, the parties having agreed that John

1 In contrast to their CPA claim, plaintiffs' bad faith claim is based only in part  
 2 on John Hancock's violation of RCW 48.102.100(1)(c). Their bad faith claim also  
 3 rests on other actions by John Hancock, namely engaging in allegedly unreasonable  
 4 delay in determining that Mr. Trudeau's check was NSF, declaring the Policy lapsed  
 5 despite multiple communications to the contrary,<sup>7</sup> and failing to provide the Trust a  
 6 reasonable opportunity to cure. *See Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d  
 7 381, 386, 715 P.2d 1133 (1986) (indicating that an insurer's "duty of good faith rises  
 8 to an even higher level than that of honesty and lawfulness of purpose toward its  
 9 policyholders: an insurer must deal fairly with an insured, giving equal consideration  
 10 *in all matters* to the insured's interests" (emphasis in original)). The Court cannot say  
 11 as a matter of law that the alleged bad faith has no causal link to any injury suffered by  
 12 plaintiffs, and thus, John Hancock is not entitled to summary judgment as to the bad  
 13 faith claim. *See Am. States Ins. Co. v. Symes of Silverdale, Inc.*, 150 Wn.2d 462, 470,  
 14 78 P.3d 1266 (2003) ("Whether an insurer acted in bad faith is a question of fact.");

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 20 Hancock has been in compliance with RCW 48.102.100(1)(c) since April 2010. *See Hockley v.*  
 21 *Hargitt*, 82 Wn.2d 337, 351, 510 P.2d 1123 (1973) (approving of an injunction to enjoin further  
 22 violations of the CPA).

23 <sup>7</sup> Plaintiffs attempt to invoke the doctrine of equitable estoppel to prevent John Hancock from  
 24 asserting that the Policy lapsed as a result of the failure to pay the premium due in February 2010.  
 25 Under Washington law, however, plaintiffs cannot use the doctrine of equitable estoppel, independent  
 26 of their bad faith claim, as a means of preserving or reviving the lapsed Policy. *See Rizzuti v. Basin*  
*Travel Serv. of Othello, Inc.*, 125 Wn. App. 602, 614, 105 P.3d 1012 (2005) ("Estoppel may not be  
 applied to extend the coverage of an insurance policy. The rationale for this rule 'is that an insurer  
 should not be required to pay for a loss for which it received no premium.' This rule may be  
 inapplicable if the insurer acts in bad faith. . . . [N]o estoppel arises if the injured party had an equal  
 opportunity to determine the facts." (citations omitted)); *Shows v. Pemberton*, 73 Wn. App. 107, 111,  
 868 P.2d 164 (1994).

1 Griffin v. Allstate Ins. Co., 108 Wn. App. 133, 148, 29 P.3d 777 (2001) (whether  
2 damages were a “direct result” of bad faith is a question of fact).

3  
4 In their summary judgment briefing, the parties did not directly address the  
5 remedies available for a bad faith claim. Plaintiffs, however, appear to seek remedies  
6 beyond actual or consequential damages, namely a refund of premiums or coverage by  
7 estoppel. Under Washington law, the availability of these latter remedies seems to  
8 turn on whether the action involves a third-party or a first-party claim. With respect to  
9 a third-party claim, arising for example when an insurer refuses in bad faith to defend  
10 or engages in bad faith handling of a claim under a reservation of rights, coverage by  
11 estoppel is a possible remedy. Kirk v. Mt. Airy Ins. Co., 134 Wn.2d 558, 564, 951  
12 P.2d 1124 (1998); Safeco Ins. Co. of Am. v. Butler, 118 Wn.2d 383, 392, 823 P.2d 499  
13 (1992).  
14

15 In contrast, in a first-party action, which might involve an insured who has  
16 suffered damage caused by inclement weather or other forces of nature, the criminal  
17 conduct of others, or the insured’s own negligence, Washington law is clear that  
18 coverage by estoppel may not be imposed. See Coventry Assocs. v. Am. States Ins.  
19 Co., 136 Wn.2d 269, 284, 961 P.2d 933 (1998) (“We hold coverage by estoppel in the  
20 first party context is not the appropriate remedy because, unlike third party reservation  
21 of rights cases, the loss in the first party situation has been incurred before the  
22 insurance company is aware a claim exists.”). Moreover, in a bad faith first-party  
23 action, absent proof of coverage, the insured is not entitled to policy benefits, id., and  
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1 the insured may not recover the premiums previously paid or a portion thereof. *Id.* at  
2 285 (rejecting the insured's contention that it should receive the portion of the  
3 premium it paid to the insurer for claims administration on the theory that the insurer  
4 should not be able to collect a premium, act in bad faith in using a portion of that  
5 premium, and then retain the entire premium).

7 As indicated in *Coventry*, however, a plaintiff prevailing on a first-party claim  
8 that an insurer acted in bad faith in evaluating coverage may recover consequential  
9 damages even when the denial of coverage is ultimately determined to be correct. *Id.*  
10 at 284-85. Such consequential damages may include the expense of hiring an expert to  
11 investigate whether coverage was due. *Id.* at 285. The parties are DIRECTED to  
12 address in their trial briefs whether plaintiffs' remedies for their bad faith claim are  
13 limited to any actual and/or consequential damages caused by John Hancock's alleged  
14 bad faith in failing to provide notice of alternative transactions and/or in handling the  
15 check tendered for payment of the premium due in February 2010 and the later events  
16 relating thereto. Plaintiffs are further DIRECTED to provide, in their trial brief, an  
17 offer of proof concerning any such actual and/or consequential damages.

## 20 **Conclusion**

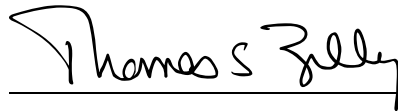
21 For the foregoing reasons, the Court denied in part and granted in part  
22 defendant's motion for summary judgment, docket no. 37, and denied in part and  
23 granted in part plaintiffs' cross-motion for partial summary judgment, docket no. 43.  
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1 Plaintiffs' CPA and bad faith claims shall remain in the case for trial, consistent with  
2 this Order.

3  
4 IT IS SO ORDERED.

5 The Clerk is directed to send a copy of this Order to all counsel of record.

6 DATED this 27th day of October, 2011.

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9 Thomas S. Zilly  
10 United States District Judge  
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